

REMARKS

Claims 2-5, 8, and 10-28 are pending, and will remain pending upon entry of this Amendment. Claims 2 and 3 have been amended to more narrowly define the R² moiety. Applicants are also concurrently herewith submitting a Request for Continued Examination and its required fee by way of authorization to charge Deposit Account No. 50-2510 to reopen prosecution of this case.

The Examiner rejected Claims 2-4, 8 and 10 under 35 U.S.C. § 103 for being obvious in light of Muller et al. I, II and Daum et al. for the reasons set forth in paper #7. Applicants maintain the validity of their rebuttals as set forth before and hereby traverse the current rejection.

As an additional response, Applicants hereby submit the Declaration of Dr. Thomas Auler under 37 C.F.R § 1.132. The Declaration provides data comparing Example 31 of US Patent 6,180,567 and Example 2 of the present application. The Declaration shows that Example 2 of the present application shows unexpectedly large increases in herbicidal activity over Example 31 of US Patent 6,180,567, particularly at the lower application rates when compared with its structural isomer. At the desirable low application rates, the compound of the Example 2 of the present invention shows not only better efficacy, but also selectivity for the crops wheat and corn. It is unexpected that positional isomers would show such a high increase in herbicidal activity. Further, in the claims as amended, R² does not include hydrogen. Therefore, the instantly claimed compounds are not positional isomers of the compounds disclosed in U.S. Patent No. 5,094,685.

Applicants further aver, for the reasons stated above, that the obviousness type double patenting rejection over that same reference is hereby rebutted by Dr. Auler's declaration as well.


With regard to the obviousness-type double patenting rejection asserted in the Office Action over Claims 1-9 of U.S. Patent No. 5,094,685, Applicants note that the primary requirement of obviousness-type double patenting is common inventorship or common ownership of the cited prior art patent and the claims in issue. MPEP § 804. A public search of US Patent No. 5,094,685 on the PAIR System of the USPTO website

reveals it to be owned by Nissan Chemical Industries Ltd. (Tokyo, JP). The assignee of the current application is Bayer Aktiengesellschaft (Germany). Hence, Applicants respect that the obviousness-type double patenting over US Patent No. 5,094,685 is improper and respectfully request that it be withdrawn.

Applicants wish to advise the Examiner that they will be submitting US 4,741,757 (believed to correspond to EP 0 207 609 A1) in a Supplemental Information Disclosure Statement for consideration by the Examiner.

In view of the foregoing, it is believed the claims are in condition for allowance. Review and reconsideration of the claims and allowance of the same are respectfully requested.

Respectfully submitted,

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